Supreme Court of the United States.

No. 31.—October Term, 1906.

International Trust Company, Plaintiff in Error, vs. John W. Weeks, Agent of the Shareholders of the Broadway National Bank.	In error to the United States Circuit Court of Appeals for the First Circuit.

[December 3, 1906.]

Mr. Justice McKenna delivered the opinion of the Court.

This is an action on contract brought in the Circuit Court of the United States for the District of Massachusetts, for rent alleged to be due under the terms of a lease made by Henry Parkman and others to the Broadway National Bank.

The original lessors sold the land and building leased to the International Trust Company, plaintiff in error. Defendant in error is agent of the shareholders of the Broadway National Bank.

The premises leased were the first floor of the building and the basement under the same, "to be used as the business offices of said corporation and for no other purpose." The lease contained a provision for re-entry upon breach of any covenant. "And thereupon the lessors may, at their discretion, relet the premises, at the risk of the lessee, who shall remain for the residue of said term responsible for the rent herein reserved, and shall be credited with such amounts only as shall be by the lessors actually realized."

On December 16, 1899, the bank became insolvent, and the Comptroller of the Currency appointed a receiver. On February 15, 1900, the Comptroller released the estate of the bank to defendant in error as the stockholders' agent. Between December 16, 1899, and January 5, 1900, the Trust Company entered upon the premises and repossessed itself of the same as of its former estate. The receiver occupied the premises for a while, but it was stipulated that such occupation was not to affect the rights of the parties. Defendant in error occupied the premises until May 19, 1900. He contended in defense of the action that upon the termination of the lease it was the duty of the Trust Company to use all reasonable effort to relet the premises, so as to minimize the damages, and that the company had not done so. And further, that suitable and responsible parties were willing at various times to hire the premises at a rent as great or greater than the rent reserved in the lease.

At the first trial of the case the Circuit Court took the opposite of defendant in error's contention, and held that by force of the lease the Trust Company did not assume any risk, and was only required to use its discretion "with some degree of reasonableness and with some degree of justice, and have some regard to the rights of the position of the other parties concerned." The court further held that the evidence did not show that the company had abused its discretion, and directed a verdict for it less certain payments made by the occupant of the basement, formerly the bank's tenant. This was reversed by the Circuit Court of Appeals. (125 Fed. Rep. 371.) The latter court held that a lessor had the right to re-enter and might exercise his discretion to relet the premises at the risk of the lessee. The lessor, it was said, need not go through the form of reletting, but an honest and reasonable attempt to relet should be made, and whether so made was a question for the jury.

Upon the second trial of the case in the Circuit Court the Trust Company expressed its contentions in requests for instructions to the jury as follows: (1) That it was entitled to rent the premises and relet them at the risk of the bank; (2) that there was no obligation upon it to notify the bank of its election so to do, or to relet the premises or attempt to relet them. The court declined to give the instructions, but instructed the jury in accordance with the principle expressed by the Circuit Court of Appeals. The jury returned a verdict for defendant in error, upon which judgment was duly entered. It was affirmed by the Circuit Court of Appeals.

(1) It is objected by defendant in error that the Circuit Court had no jurisdiction of this action. We think otherwise. The action is clearly one to wind up the affairs of the bank. (*In re Chetwood*, 165 U. S. 443, 459; *Guarantee Co.* v. *Hanway*, 104 Fed. Rep. 369.)

(2) The fact that the Trust Company did not make a reasonable effort to relet the premises was settled by the verdict of the jury against it, and the case is reduced to the simple question whether the company can recover by virtue of the provisions of the lease without any attempt whatsoever to relet the premises.

It is said in argument that the provision in controversy has been found in the usual form of lease in Massachusetts for a generation, and yet its meaning, as now brought in dispute, has not come up for or received explicit decision. To this absence of contention and decision both parties refer with equal confidence to establish that their respective constructions have been so indisputable as never to have been questioned. However, there are some indications of a judgment between the two constructions in the case of *Edmunds* v. *Rust & Richardson Drug Co.*, (191 Mass. 123,) which may be turned to in passing on a question so essentially local.

The lease passed on contained a provision for an entry by the lessors to terminate the lease for the breach of covenants, followed by this language: "But the lessee covenants to be responsible for any loss or diminution of rent sustained by lessors in consequence till the end of the lease." The defendant in the case requested instructions, expressing it to be the duty of the lessor to accept any tenant that was satisfactory financially to defendant. His instructions were refused, and the court instructed the jury, among other things, as follows: "In general, the effort must be that which a reasonable landholder would make under the circumstances. Not every proposed tenant need be accepted, but an unreasonable refusal to accept a suitable tenant will be deemed an abandonment of the election to relet at the risk of the lessee." Commenting on the instructions the Supreme Judicial Court said: "That the jury were left to decide between the parties, in a way of which the defendant has no reason to complain."

It is manifest from this decision that the lessor, after entry, has not the absolute discretion to relet or not to relet the premises, but that it is his duty to "prevent unnecessary loss or diminution of rent in consequence of the termination of the lease."

In *Browditch* v. *Raymond*, (146 Mass. 109,) the liability of the lessor, under the provision of a lease such as that in controversy, was denied against an insolvent lessee on the ground that it was dependent upon a contingency, not merely as to the amount of liability, but as to whether it would ever attach or arise out of the covenant. "The lessors," the court said, "in their discretion might not relet the premises, but resume possession of them." This case rests on the principle expressed by Judge Lowell, speaking for the Circuit Court of Appeals, that if the lessor avail himself of the covenant and re-enter he may exercise his discretion to relet the premises at risk of the lessee or occupy them. If he elect to relet he must make "an honest and reasonable attempt to relet." And this is a reasonable and just exaction. It is the spirit as well as the letter of the covenant, fulfilling its security without unnecessary loss to the lessee.

Whether the bank could have made a lease to extend beyond its charter life we need not decide.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.